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No. 15-497

In The
Supreme Court of the United States

STACY FRY, et vir, as Next Friends of Minor E.F.,

Petitioners,

v.

NAPOLEON COMMUNITY SCHOOLS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF PSYCHIATRIC SERVICE DOG PARTNERS, INC.; NORTH STAR FOUNDATION, INC.; TADSAW, INC.; AND K9 RESOURCES LLC AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Handicapped Children's Protection Act of 1986 (HCPA), 20 U.S.C. § 1415(*l*), requires exhaustion of state administrative remedies under the Individuals with Disabilities Education Act (IDEA) for non-IDEA actions "seeking relief that is also available under" the IDEA. The question presented, on which the circuits have persistently disagreed, is:

Whether the HCPA commands exhaustion in a suit, brought under the Americans with Disabilities Act and the Rehabilitation Act, that seeks damages – a remedy that is not available under the IDEA.

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Alboniga v. School Board of Broward County Florida, 87 F.Supp.3d 1319 (S.D. Fla. 2015) 27

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EF ex rel. Fry v. Napoleon Community Schools, No. 12-15507, 2014 WL 106624 (E.D. Mich. Jan. 10, 2014), *aff'd*, *Fry v. Napoleon Community Schools*, 788 F.3d 622 (6th Cir. 2015), cert. granted, No. 14-1137, 2016 U.S. LEXIS 4265, 84 U.S.L.W. 3703 (Jun. 28, 2016) ..... *passim*

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Office for Civil Rights, U.S. Dept. of Ed., Resolution Agreement: Napoleon Community Schools, OCR Docket #15-10-1268, Sup.Ct. Docket No. 15-497 Joint Appendix, JA 43-54 (April 26, 2012) 5, 21

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STATUTES AND REGULATIONS:

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Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,544 (1991) 32

Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56,164 (2010) 9

Nondiscrimination on the Basis of Disability in State and Local Government Services: Corrections, 76 Fed. Reg. 13,285 (2011) 10

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RULES:

Sup. Ct. R. 37.3(a) 1

Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

Bray, Emily, et al., *Context Specificity of Inhibitory Control in Dogs*, 17 Animal Cognition 15 (2014) 29

Burrows, Kristen E., et al., *Sentinels of Safety: Service Dogs Ensure Safety and Enhance Freedom and Well-Being for Families with Autistic Children*, 18(12) Qualitative Health Research 1642 (2008) 24

Camp, Mary M., *The Use of Service Dogs as an Adaptive Strategy: A Qualitative Study*, 55 American Journal of Occupational Therapy 509 (2001) 11, 16, 19

Chur-Hansen, Anna, et al., *The Experience of Being a Guide Dog Puppy Raiser Volunteer: A Longitudinal Qualitative Case Study*, 5 Animals 1 (2014) 25

Ensminger, John J., *Service and Therapy Dogs in American Society* (2010) 32

Fairman, Stacy K., and Ruth A. Huebner, *Service Dogs: A Compensatory Resource to Improve Function*, 13(2) Occupational Therapy in Health Care 41 (2000) 26

TABLE OF AUTHORITIES – Continued

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Fallani, Gaia, et al., *Do Disrupted Early Attachments Affect the Relationship between Guide Dogs and Blind Owners?* 100 Applied Animal Behaviour Science 241 (2006) 28

Glenn, Margaret K., *An Exploratory Study of the Elements of Successful Service Dog Partnerships in the Workplace*, 2013 ISRN Rehabilitation 278025: 1 (2013) 33

Hauser, Sabrina, et al., *Understanding Guide Dog Team Interactions: Design Opportunities to Support Work and Play*, Proceedings of the 2014 Conference on Designing Interactive Systems 1-10 (2014) 25

Huss, Rebecca J., *Canines in the Classroom Revisited: Recent Developments Relating to Students' Utilization of Service Animals at Primary and Secondary Educational Institutions*, 9 Alb. Gov. L. Rev. 1 (2016) 10

Jalongo, Mary R., *Attachment Perspective on the Child-Dog Bond: Interdisciplinary and International Research Findings*, 43(5) Early Childhood Ed. J. 395 (2015) 27, 28

Mader, Bonnie, et al., *Social Acknowledgments for Children with Disabilities: Effects of Service Dogs*, 60(6) Child Development 1529 (1989) 16

Martin, Francois and Jennifer Farnum, *Animal-Assisted Therapy for Children with Pervasive Developmental Disorders*, 24(6) Western J. of Nursing Res. 657, 667 (2002) 24

TABLE OF AUTHORITIES – Continued

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Milan, Robert Wesley, Quality of Life of Service Dog Partners (unpublished Ms. thesis, University of Pittsburgh, available at http://d-scholarship.pitt.edu/6621/) (2007) 19, 20

Naderi, Sz., et al., *Co-operative Interactions between Blind Persons and Their Dogs*, 74 Applied Animal Behaviour Science 59 (2001) 28

Rintala, Diana H., et al., *The Effects of Service Dogs on the Lives of Persons with Mobility Impairments: A Pre-Post Study Design*, 2002:15(2) Am. Assoc. of Spinal Cord Injury Practitioners and Social Workers 65 (2002) (available at http://www.academyscipro.org/Public/PSWJournal.aspx) 12

Sachs-Ericsson, Natalie, et al., *Benefits of Assistance Dogs: A Review*, 47(3) Rehabilitation Psychology 251 (2002) 29

Sanders, Clinton R., *The Impact of Guide Dogs on the Identity of People with Visual Impairments*, 13(3) Anthrozoos 131 (2000) 16, 17

Shintani, Mai, et al., *The Effect of Service Dogs on the Improvement of Health-Related Quality of Life*, 64(2) Acta Med. Okayama 109-113 (2010) 15

Shubert, Jan, *Dogs and Human/Mental Health: From the Pleasure of Their Company to the Benefits of Their Assistance*, 2012 U.S. Army Med. Dept. J. 21 (2012) 11

TABLE OF AUTHORITIES – Continued

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Stephanitz, Max von, *The German Shepherd Dog in Word and Picture* (English ed. 1923).....34

Topal, Jozsef, et al., *Reproducing Human Actions and Action Sequences: "Do as I do!" in a Dog*, 9 Animal Cognition 355 (2006).....29, 30

Valsecchi, Paolo, et al., *Development of the Attachment Bond in Guide Dogs*, 123 Applied Animal Behaviour Science 43 (2010) 29

Whitmarsh, L., *The Benefits of Guide Dog Ownership*, 7(1) Visual Impairment Research 27, 37 (2007).....34

INTEREST OF *AMICI CURIAE*[1]

Psychiatric Service Dog Partners, Inc. is a South Carolina nonprofit corporation promoting the mental health of people using service dogs for psychiatric disabilities by educating, advocating, providing expertise, facilitating peer support, and promoting responsible service dog training and handling. The organization works for legislative and regulatory change on issues involving service animals and is a participant on an advisory committee established by the Department of Transportation to consider revisions to airline access rules for individuals using service and support animals.

TADSAW, Inc. is a Texas nonprofit corporation that trains a medical alert service dog for any wounded Veteran Service Member (Active Duty, Retired, or Discharged), and members of their immediate families, surviving with Military Induced Anxiety Depression Syndrome (MIADS), Post-Traumatic Stress Disorder (PTSD), Military Sexual Trauma (MST) or Traumatic Brain Injury (TBI) in order to restore and improve their Quality of Life with a canine 'Battle Buddy.' Since July 2010, TADSAW has accredited almost 600 Service Dog Teams. TADSAW, Inc. provides educational assistance to businesses, offices, and governmental agencies

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[1] Pursuant to this Court's Rule 37.3(a), the parties have given blanket written consent to the filing of *amicus* briefs. Pursuant to this Court's Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

on acceptable etiquette and interaction of employees and clients in the treatment of persons with service dogs.

North Star Foundation is a Connecticut nonprofit corporation that breeds, trains, and places service dogs for children who face social, emotional, or educational challenges. North Star has created over 250 service dog teams for children with special needs, with over half going to children on the autism spectrum. North Star also works with schools to raise awareness about service dogs in general, as well as to inform school personnel about the specific purposes of North Star dogs that accompany their children with special needs to the classroom.

K9 Resources LLC is an Ohio Limited Liability Company that trains law enforcement canines and other specialized dogs, including approximately 85 service dogs for individuals with disabilities. The company also trains local, state and federal officials, as well as school administrators and teachers, regarding the functions that trained dogs can perform for children, including children with disabilities, and how the proficiency of the dogs in performing their tasks is best maintained.

Amici differ in the types of dogs they train or help others to train and use, but are all concerned with removing barriers encountered by users of service dogs in society, including in public schools and other educational settings. They are concerned that the process by which a child with special needs adapts to and begins

to work with a service dog with medical or prosthetic functions should not be delayed because school personnel are unfamiliar with such trained dogs and need a protracted learning curve of their own in order to determine how to accommodate such complicated and living assistants. *Amici* believe that affirmance of the courts below in the present matter will encourage certain schools and school systems to throw up unnecessary procedural barriers to the admission of service animals used by children with special needs. They are also concerned that affirmance would give schools a reason not to revise outdated policies that recognize only specific types of dogs, such as guide dogs and signal dogs, because such policies fail to take into account certain present and developing types of service animals that are trained to perform work or tasks directly related to an individual's disability.

SUMMARY OF THE ARGUMENT

After E.F. attended kindergarten for one day in October 2009 with her trained service dog named Wonder, the principal of the Ezra Eby Elementary School told her parents that Wonder could not come back with E.F. Beginning in December 2009, however, the parents began to take E.F. to school accompanied with Wonder, her trained service dog. At a meeting on January 7, 2010, the Frys agreed to mediation to resolve the issues regarding Wonder's coming to school with E.F. Having received a letter from one of E.F.'s treating physicians and another letter signed by a physical

therapist and a speech language pathologist that were treating E.F. outside of school, the school district agreed on March 22, 2010, that E.F. could come to school with Wonder on a 30-day trial basis. This period was extended to the end of the school year.

During the trial period, school staff recorded what they considered to be deficiencies in Wonder's behavior. Wonder was generally separated from E.F., both in the classroom and for many school activities, often remaining at the back of the classroom with E.F.'s mother, who came as a handler. Thus, the school did not use the period to gain a better understanding of the service dog and his functions and the benefits he was providing to E.F., but rather to gather evidence that could justify excluding Wonder in the future. At the end of the school year, Petitioners were advised that Wonder would not be permitted to accompany E.F. when first grade began in the fall. Petitioners began homeschooling E.F. and filed a complaint with the Office for Civil Rights in the Department of Education (OCR).

After two years, the complaint with OCR was resolved in favor of the position of Petitioners when OCR concluded that the school district "should have modified [its] policies and practices to permit the service animal to accompany and assist the Student through the school day. . . ." Office for Civil Rights, U.S. Dept. of Ed., OCR Docket #15-10-1268 and #15-10-1269 (Appendix A to complaint of Plaintiffs/Petitioners, filed Dec. 17, 2012, 2:12-cv-15507-LPZ-DRG), Sup. Ct. Docket No.

15-497 Joint Appendix, JA 16, 34 (Aug. 22, 2016) (hereinafter "OCR Report"). Although Respondents entered into an agreement with OCR in April 2012 under which Wonder could return with E.F. to the school, Respondents nevertheless did not agree with the factual or legal conclusions of the OCR Report. Office for Civil Rights, U.S. Dept. of Ed., Resolution Agreement: Napoleon Community Schools, OCR Docket #15-10-1268, Sup.Ct. Docket No. 15-497 Joint Appendix JA 43 (Apr. 26, 2012) (hereinafter "Resolution Agreement").

Sensing Wonder would be unwelcome despite the agreement, Petitioners applied to "a school in a different district where they encountered no opposition to Wonder attending school with E.F." *Fry v. Napoleon Community Schools*, 788 F.3d 622, 624 (6th Cir. 2015) (hereinafter "*Fry*"). Petitioners then filed a claim in federal district court for damages and other relief under the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* (ADA), and a state law claim. Respondents answered that the action should be dismissed because the Frys had not exhausted administrative remedies under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (IDEA). The complaint was dismissed by the district court. *EF ex rel. Fry v. Napoleon Community Schools*, No. 12-15507, 2014 WL 106624 (E.D. Mich. Jan. 10, 2014) (hereinafter "*EF*"), which was affirmed by a panel majority in the Sixth Circuit. *Fry*, 788 F.3d at 631.

Petitioners did not pursue administrative remedies under the IDEA at the end of the spring term in 2010 because they were not seeking to alter E.F.'s Individualized Education Program (IEP) but rather were seeking to enforce her rights under the ADA and the Rehabilitation Act, for which OCR was a more appropriate authority. Nor did they pursue administrative remedies after the OCR Report was issued in May 2012, which would have been pointless as they enrolled her in a different school.

Further administrative remedies should not have been required because (1) Wonder's functions are not educational in nature, but rather are assistive to E.F.'s mobility in all environments including schools and Respondents' educational system should not be able to countermand or interfere with medical and physical therapy determinations as to the best way for E.F. to achieve maximum independence, making insistence that such remedies be pursued a deprivation of her rights under the ADA and the Rehabilitation Act; (2) pursuing the remedies suggested by Respondents would have led to further separation of E.F. from Wonder at a time when the development of a bond between them was crucial to E.F. being able to use Wonder as a living, sentient assistant, both because of her own need to continue working with Wonder and Wonder's need to maintain his training by working with E.F. in school, one of the environments in which she needed his assistance; and (3) the school would not have insisted on exhaustion of administrative remedies had E.F. been blind or had a visual impairment and needed a guide dog because school policy automatically accepted such

a dog, making the imposing of different requirements and additional administrative procedures for other types of service animals a violation of the ADA and the Rehabilitation Act.

The district court and the Sixth Circuit majority expressed concern that parents of children with disabilities might be strategically trying to avoid exhaustion requirements under the IDEA by not alleging violations of the IDEA or by seeking relief not available under the IDEA. *EF*, 2014 WL 106624 at *3-*5; *Fry*, 788 F.3d at 626. This, however, fails to consider that schools and school systems might also be looking at such disputes strategically when insisting on sequential and pointless administrative remedies being conducted by officials who have collectively determined that a service animal should be kept out of a school. Thus, failure to reverse the decision of the Sixth Circuit will provide a means by which school systems reluctant to admit service dogs may significantly delay their acceptance. Such delays can impede formation of the bond that must develop between a service dog and a child who needs the dog to achieve a maximum level of independence in life. Affirmance of the Sixth Circuit will also effectively permit school districts with policies recognizing only guide dogs or certain limited types of service dogs as legitimate service animals to continue such restrictive policies until a dispute arises.

Amici submit that the question now presented to the Court should be answered in the negative, i.e., that exhaustion of administrative remedies under the IDEA should not be required before a suit for damages

can be instituted under the ADA and the Rehabilitation Act. As to a medically prescribed and dignity-providing service dog, there should be no exhaustion requirement since any mention of a service animal in the IEP of the child is for informational purposes of school staff and does not give the student or her parents a claim for relief under the IDEA.

ARGUMENT

I. PETITIONERS' DOG IS A SERVICE ANIMAL WHOSE MOBILITY ASSISTANCE FUNCTIONS ARE NONEDUCATIONAL IN NATURE AND PROVIDE A CHILD WITH CEREBRAL PALSY THE OPPORTUNITY TO DEVELOP MAXIMUM INDEPENDENCE BOTH INSIDE AND OUTSIDE OF SCHOOL AND WITH GREATER DIGNITY THAN IS POSSIBLE WITH A HUMAN AIDE.

Judge Daughtrey, dissenting in the Sixth Circuit, correctly observes that the claim of the Frys was not educational in nature so "the IDEA's exhaustion provision was improperly invoked by the district court." *Fry*, 788 F.3d at 631. Judge Daughtrey also states that even if the accommodation sought could be considered educational, "the fact that school policy would permit a 'guide dog' on campus, but not a certified 'service dog,' suggests why an attempt at exhaustion of administrative remedies would be futile in this case and should be excused." *Fry*, 788 F.3d at 631-32. Wonder's functions

were not education-related but were rather those of disability mitigation, involving behavioral synchronization and spatial cooperation between service dog and master, as is the case with a guide dog. In maintaining a policy under which guide dogs are allowed to accompany students with visual impairments but a non-guide service dog, trained as a mobility impairment dog, was not allowed to accompany a student afflicted with spastic cerebral palsy, Respondents were illegally distinguishing between types of disabilities.

A. Wonder is a medically prescribed and certified service dog trained to assist a child with motor and mobility impairments.

The Department of Justice first issued comprehensive and detailed regulations regarding service animals in 1991, which were significantly revised in 2010,[2]

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[2] In applying the service animal regulations to public entities in 2010 (effective March 15, 2011), the Department of Justice stated:

> Although there is no specific language in the 1991 title II regulation concerning service animals, title II entities have the same legal obligation as title III entities to make reasonable modifications in policies, practices, or procedures to allow service animals when necessary in order to avoid discrimination on the basis of disability, unless the entity can demonstrate that making the modifications would fundamentally alter the nature of the service program, or activity.

Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56,164, 56,191 (2010). For a discussion as to how the Title II regulations conformed to prior

with a small but important revision in 2011.[3] Title II regulations of the ADA define a service animal as "any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability." The definition also provides examples of "work or tasks" that a service animal may perform, including "pulling a wheelchair, . . . retrieving items such as medicine or the telephone, [and] providing physical support and assistance with balance and stability to individuals with mobility disabilities. . . ." 28 C.F.R. § 35.104 (2015). The OCR Report states:

> [T]he [Frys] provided the [school and the school district] with documentation of the service animal's training, including a list of tasks the service animal had been trained to perform for the Student, as well as the handler and service animal training certificates. In addition, the Complainant provided the District with letters from the Student's treating physicians supporting the Student's need for

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policy statements of the Department of Justice regarding state and local entities, see Rebecca J. Huss, *Canines in the Classroom Revisited: Recent Developments Relating to Students' Utilization of Service Animals at Primary and Secondary Educational Institutions*, 9 Alb. Gov. L. Rev. 1, 6-7 (2016).

[3] Nondiscrimination on the Basis of Disability in State and Local Government Services: Corrections, 76 Fed. Reg. 13,285-86 (2011), specifying that the work or tasks performed by a service animal "must be directly related to the individual's disability." The wording in the 2010 release had specified that the direct relationship between the animal's work or tasks had to be the *handler's* disability, but it was realized that with some service dogs, such as autism service dogs, the handler may be a parent or aide.

> the service animal, which stated that the service animal would increase the Student's independence, that the service animal should be permitted to assist the Student with mobility and transition, and that the service animal would assist the Student in developing more independent motor skills.

OCR Report at JA 21-22. The service dog used by E.F. was trained to help her by picking up dropped items,[4] assisting her to transfer to and from a toilet, stabilizing her while she transitioned to and from her walker, assisting with directional control of her walker, serving as a bridge for transitioning from her walker to a standing or seated position at a table, improving her sitting balance by providing posterior support, and helping her to bridge social barriers. *Fry*, 788 F.3d at 624, 628, 637. These are functions of a mobility impairment dog and are not educational in nature, but rather reflect the fact that Wonder is in significant part an assistive technology to E.F., as is her wheelchair, both of which improve her mobility in every environment in which she lives.[5] Individuals with such conditions may

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[4] See Mary M. Camp, *The Use of Service Dogs as an Adaptive Strategy: A Qualitative Study*, American Journal of Occupational Therapy 509, 512 (2001) ("By far, the most common task that participants used their service dogs for was to retrieve dropped items."). She refers to service dogs as "the ultimate assistive technology." *Id.* at 516.

[5] For a discussion of the tasks that mobility impairment dogs can perform, see Jan Shubert, *Dogs and Human/Mental Health: From the Pleasure of Their Company to the Benefits of Their Assistance*, 2012 U.S. Army Med. Dept. J. 21 (2012).

use this combination of technologies throughout their lives.[6]

A school should not be able to refuse admission to any service dog that will do work or perform tasks in a school environment for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability, unless the dog is out of control or not housebroken, or would fundamentally alter the environment. 28 C.F.R. § 35.136(b) (2015); 28 C.F.R. § 35.130(b)(7) (2015). There will be instances where school personnel need to understand the dog's function so that responsibilities of teachers and aides may be adjusted, but the learning curve of the staff is not a reason for delaying or limiting a child's use of a service animal. As stated by a California district court, "the question is not whether Eddy [an autism service dog] will improve Plaintiff's educational progress, but whether Eddy will fundamentally alter Defendants' educational program." *C.C. v. Cypress Sch. Dist.*, No. 11-352, 2011 U.S. Dist. LEXIS 88287 (C.D. Cal. 2011) (granting preliminary injunction requiring school district to accommodate child's service dog in school). Thus, for E.F., any mention of a

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[6] Diana H. Rintala et al., *The Effects of Service Dogs on the Lives of Persons with Mobility Impairments: A Pre-Post Study Design*, 2002:15(2) Am. Assoc. of Spinal Cord Injury Practitioners and Social Workers 65, 70 (2002) (available at http://www.academyscipro.org/Public/PSWJournal.aspx), states that by 1996 there were more than 2,500 service dogs assisting people with physical impairments, but that because of demand, waiting lists are long and applicants have to wait one to two years or longer to obtain such a dog.

service dog in her IEP should have been regarded by Respondents as solely informational so school staff can prepare and adapt as needed to accept the service dog.

B. None of the functions Wonder was trained to perform were intended to alter the educational experience of E.F. and those functions were not within the expertise, or apparently understood by, the administration of Napoleon Community Schools.

The functions of E.F.'s service dog should not have been subject to removal, even temporarily, by school officials. The OCR Report notes that E.F.'s "cerebral palsy . . . significantly limits her motor skills and mobility but does not impact her cognitively." OCR Report at JA 19. Judge Daughtrey correctly observes that a school system's expert determination about technical educational issues might "concern whether speech therapy would help a child struggling with autism to communicate," but "it would *not* concern . . . whether a blind child should be furnished with a guide dog or outfitted with a white cane; or whether a crippled child should be confined to a wheelchair or encouraged to use a walker *assisted in balance and navigation by a service dog*." *Fry*, 788 F.3d at 636. Judge Daughtrey adds that "for [E.F.], Wonder functions as an access ramp – not just in terms of the school building but, more significantly, in all aspects of her life." *Fry*, 788

F.3d at 633. The presence of a service dog was not necessary to enhance E.F.'s "educational opportunities," as suggested by the majority and properly criticized by the dissent. *Fry*, 788 F.3d at 631, 634.

By refusing to allow E.F. to use her service dog in school, Respondents were limiting her ability to function as normally as possible in the school environment, as she does in other times and places. As stated by a California district court 26 years ago in another case involving a child with cerebral palsy who had a dog trained to give her greater independence by increasing her mobility:

> [P]laintiff has chosen to use a service dog to increase her physical independence and to decrease her need to rely on others to perform tasks that are beyond her own physical capacity. The choice to employ a service dog for these purposes is akin to choosing to use a wheel-chair to increase her mobility rather than a pair of crutches. By excluding her service dog, defendants have asked plaintiff to assume a different persona while she attends school, i.e., the persona of a disabled person without a service dog. In this basic sense, the effect of defendants' decision to deny entrance to the service dog is to exclude the person who exists everywhere but in school, i.e., a disabled person with a service dog, from participation in the educational program as well.

Sullivan v. Vallejo City Unified Sch. Dist., 731 F.Supp. 947, 958 (E.D. Cal. 1990). School district officials apparently even believed a service dog and a human aide

as mutually exclusive as Judge Daughtrey notes that "they threatened to eliminate the human aide from the child's IEP if her parents insisted on having Wonder accompany [E.F.] in school." *Fry*, 788 F.3d at 632.

C. The school should not be able to exclude a service dog that allows the performance of tasks such as moving on and off a toilet with greater dignity than can be achieved with any human assistance.

As stated in the Sixth Circuit decision, "in January 2010, school administrators confirmed the decision to prohibit Wonder, reasoning in part that Wonder would not be able to provide any support the human aide could not provide." *Fry*, 788 F.3d at 624. That the school officials did not understand the independence value of the service dog to E.F. is underscored by an incident described in the OCR Report, stating that "Respondents required that [E.F] demonstrate her use of the service animal while using the toilet, with the stall door open and four adults observing, which embarrassed her." OCR Report at JA 27.

Studies have found that individuals with disabilities feel more independent with service dogs than they do when dependent on assistance of other individuals, either professionals or family members. Mai Shintani et al., *The Effect of Service Dogs on the Improvement of Health-Related Quality of Life*, 64(2) Acta Med. Okayama 109, 112 (2010), surveying service dog owners

who had spinal and other physical injuries with other individuals with similar injuries but without service dogs, found "that service dog owners feel a decrease in physical and mental burdens in daily activities, which contributes not only to their improved QOL [quality of life], but also to the possibility of independence and social participation." Bonnie Mader et al., *Social Acknowledgments for Children with Disabilities: Effects of Service Dogs*, 60(6) Child Development 1529 (1989), find that service dogs "serve as an antidote for social ostracism." This team compiled statistical evidence that people encountering children in wheelchairs were significantly more likely to smile, to give friendly glances, and to institute conversations if the children were accompanied by service dogs than if they were not. (See Appendix A herein for further discussion of and figures from this research.)

Mary M. Camp, *The Use of Service Dogs as an Adaptive Strategy: A Qualitative Study*, 55 American Journal of Occupational Therapy 509, 515 (2001), in a study of mobility service dog users, found that "[f]or all participants, the meaning of having a service dog seemed to be connected with [a] shift of focus away from their disabilities and onto their abilities to accomplish tasks independently using their dogs." Clinton R. Sanders, *The Impact of Guide Dogs on the Identity of People with Visual Impairments*, 13(3) Anthrozoos 131, 134 (2000), notes that "dog-assisted independence" gives users of guide dogs "a feeling of wholeness. . . ." One user said to Sanders: "With a dog you are whole. You are not two people trying to function together,

you're one unit. Even though you are two bodies it doesn't feel that way." *Id.* "[T]he dog is transformed into a literal extension of the owner's self. . . ." *Id.* at 136.

> This intimate partnership, this merger of two into one, transformed their definitions of themselves and, because of the way it shaped their social encounters, enhanced their identities in the public eye. No longer helpless, they were competent and able to move with confidence and grace. They could now live . . . "a life without fear."

Id. Respondents, rather than demonstrating any expertise on the value of the service dog to E.F., consistently denied his abilities and refused to allow him to accompany E.F. except briefly while E.F. was in kindergarten.

D. The general social effects of having a service dog would exist both in non-educational and educational environments and do not reflect an educational function.

The Sixth Circuit decision notes that the Frys described social and psychological benefits coming from E.F.'s collaboration with Wonder:

> The Frys characterize Wonder's independent value to E.F. as assistance with specific physical tasks, enabling her "to develop independence and confidence," and helping her "to bridge social barriers." Thus if the human

> aide was not a sufficient accommodation relative to Wonder, that was because he or she did not increase E.F.'s ability to perform physical tasks and function confidently and independently outside of school. One might also infer, though the Frys do not allege it directly, that relying on only a human aide without the additional presence of a service dog would inhibit E.F.'s sense of confidence and independence, as well as her ability to overcome social barriers, *in* school.

Fry, 788 F.3d at 628.

Thus, the benefits that Wonder provides to E.F. at all times every day were seen by the panel majority as giving the school educational authority over the use of the dog because those benefits also could be identified as occurring *in* school. The majority is aware that skills developed in school have significance outside of school: "Developing a bond with Wonder that allows E.F. to function more independently outside the classroom is an educational goal, just as learning to read braille or learning to operate an automated wheelchair would be." *Id.* Although acknowledging the benefit of a wheelchair, it is highly doubtful the majority would suggest that the benefit of a wheelchair outside of school was sufficient for a child's needs so that the school could be given authority to deny use of the wheelchair inside the school. Indeed, a mobility impairment dog is in significant part an assistive device to an individual with motor and mobility disabilities, and the majority was essentially allowing the school to delay and perhaps prohibit use of that device in school.

The majority notes that a child's "confidence and social experience at school . . . fall under the scope of factors considered under IDEA procedures." *Id.* Thus, the logic appears to be that the pediatrician's prescription of a service dog, and the family's fundraising to have the dog trained by a professional service dog training facility to serve their daughter's needs, could be ignored by the school because the school also hoped the child would become confident and develop social abilities. Wonder's effect in bridging social barriers, as explained in Appendix A, is not a task but rather an inevitable result of an individual's being accompanied by a service animal in public settings, and is accomplished by the mere existence of a trained and calmly disposed service dog. Mary M. Camp *supra*, at 510, argues that the "socializing effect of service dog ownership . . . may help to counteract the documented social barriers often experienced by persons with disabilities. . . ." She elaborates that "[u]nlike owning a wheelchair or electronic aid, owning a dog is an experience that is familiar to persons with or without disabilities. In this way, service dogs provide common ground, bridging the differences that may cause social isolation and facilitating a renewed sense of connection with others." *Id.* at 516.

Users of wheelchairs who have service dogs also go more places and cover more distance daily on average than users of wheelchairs who do not have service dogs. Robert Wesley Milan, Quality of Life of Service Dog Partners (unpublished Ms. thesis, University of Pittsburgh, available at http://d-scholarship.pitt.edu/6621/)

(2007), compared wheelchair users who had service dogs with wheelchair users who did not have service dogs on a number of scales. Milan found, defining mobility as an "individual's ability to move about effectively in his/her surroundings," that mobility scores were significantly higher for the service dog group. This was true even though the service dog group "had significantly more individuals with severe and progressive disabilities. . . ." *Id.* at 48.

II. RESPONDENTS' PERSISTENT REFUSAL TO ALLOW WONDER TO ACCOMPANY E.F. TO SCHOOL AND THE CONTINUAL REJECTION OF WONDER AS A SERVICE ANIMAL INDICATE THAT RESPONDENTS SAW PROLONGED ADMINISTRATIVE PROCEDURES AS A MEANS OF AT LEAST DELAYING ACCEPTANCE OF WONDER INTO THE SCHOOL, AND ALSO INDICATE THAT RESPONDENTS FAILED TO UNDERSTAND THE NECESSITY OF E.F. AND WONDER DEVELOPING A BOND SO THAT THEY COULD FUNCTION TOGETHER AS EFFECTIVELY AND QUICKLY AS POSSIBLE.

Respondents first refused to allow Wonder to accompany E.F. to kindergarten after the first day E.F. attended school with the dog in October 2009, then seemingly relented during a two-month "trial period" from April 12 to June 11, 2010, during which Wonder was largely separated from E.F. Respondents resumed and maintained their refusal to admit Wonder during the two years the Frys home-schooled E.F. while OCR

conducted its investigation. Upon OCR concluding its investigation in May 2012, Respondents agreed to accept Wonder but continued to dispute OCR's findings. Resolution Agreement at JA 43. Unsurprisingly E.F.'s parents chose to enroll her in a different school.[7] Thus, despite nearly continuous opposition to Wonder for two and a half years from October 2009 until May 2012, Respondents argue that they and the Michigan school system needed more hearings and more time.

A. Although the school permitted E.F. to be accompanied by Wonder during a two-month "trial period" at the end of the kindergarten school year, the purpose of the period from the school's perspective appears not to have been to understand how E.F. and Wonder work together but rather to give school personnel time to amass a list of difficulties associated with complying with federal law allowing Wonder's presence in the school.

During the two-month trial period in 2010, the OCR Report states that "the service animal became confused about whom to assist when the service animal and the handler were repeatedly made to sit in the

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[7] Other parents in the same situation have preferred to send their children to schools more accepting of the use of service animals. See, e.g., *Hughes v. Dist. Sch. Bd. of Collier County*, No. 2:06-cv-629-FtM-29DNF, 2008 WL 4709325, 2008 U.S. Dist. LEXIS 110804 (M.D. Fla. 2007).

back of the classroom away from the Student. . . ." OCR Report at JA 36. Wonder was not permitted to assist E.F. outside the classroom either:

> Based on Recipient [Napoleon Community Schools] records, OCR learned that, during the trial period, the Recipients prohibited the Student from participating in school-related activities such as a school play, "Relay for Life," and "field day" with the service animal. Recipient records revealed that the Recipients also prohibited the service animal from accompanying and assisting the Student during recess, lunch, computer lab, library activities, and other specials, and prohibited the service animal from assisting the Student during the provision of therapy services. Furthermore, according to letters, handwritten notes, and emails that the Recipients submitted to OCR, the Recipients forbade the use of the service animal for certain tasks that the service animal had been specifically trained to do, such as assisting the Student with toileting.

OCR Report at JA 27. Thus, even though Wonder was sometimes in the same room as E.F. during the trial period, he was often prohibited from being close enough to her to perform the tasks he had learned. The purpose of the trial period was in fact to allow the school to record evidence that its officials either regarded as proving that Wonder was not adequately trained or was not functioning as a service animal:

> According to a letter the Recipients' attorney submitted to OCR on November 5, 2010, as

> well as other documents submit[illegible] by the Recipients, the express purpose of the trial period was to allow them time to evaluate and further observe the service animal, as well as the third-party handler (i.e., the Complainant [Stacy Fry]), in the school setting. During the trial period, records kept by District staff who observed the service animal during the trial period contain detailed notes of each time: the service animal required more than one command or attempt to complete a task, because the service animal did not successfully complete the task on the first try; the handler read a book or magazine, took notes, typed on her cell phone, said anything to or responded to a staff person or another student, or left the room to take her other child to his classroom before the bell rang; the Student did not use the service animal when she could have used the service animal; or the Student made a face or seemed displeased when something the service animal retrieved for her had slobber on it.

OCR Report at JA 26-7. Thus, Wonder was often behind the class with E.F.'s mother, whose interactions with the dog were carefully watched for any violation of classroom decorum, including Stacy Fry dealing with her other child in the school. It does not seem to have occurred to the school that forcing the dog to be with the mother could have resulted in a "likely estrangement from" E.F. due to "an increased attachment with" Stacy Fry, taking phrases from *A.S. ex rel. Leonel S. v. Catawba County Board of Education*, No.

5:11-CV-27, 2011 WL 3438881 at *6 (W.D.N.C. Aug. 5, 2011).[8]

Recording instances where E.F. "made a face" because of something Wonder did would suggest that the school did not see the bonding between the service dog and the child as capable of having any elements of a companion relationship or that such a relationship can contain elements of humor.[9] Observers also recorded one occasion where Wonder barked at "two boys roughhousing," and another when he growled, though in both instances Wonder remained under the handler's control. OCR Report at JA 28. As noted by an Illinois court, the state's definition of a service animal "does not specify service animals must behave perfectly at all times." *K.D. v. Villa Grove Community Unit School District No. 302 Board of Education*, 403 Ill.App.3d 1062, 936 N.E.2d 690, 699 (Ill. App. Ct. 2010). Anna

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[8] The triadic relationship of child, service dog, and parent has been studied particularly with children who have autism where the parent has to serve as a handler while the child must nevertheless develop a bond with the service dog. See Kristen E. Burrows et al., *Sentinels of Safety: Service Dogs Ensure Safety and Enhance Freedom and Well-Being for Families with Autistic Children*, 18(12) Qualitative Health Research 1642, 1646 (2008). With E.F., on the other hand, Wonder was responsive to E.F.'s verbal commands and it was hoped that, as E.F. developed motor skills, she would be the dog's sole handler. *Fry*, 788 F.3d at 624; OCR Report at JA 21.

[9] Francois Martin and Jennifer Farnum. *Animal-Assisted Therapy for Children with Pervasive Developmental Disorders*, 24(6) Western J. of Nursing Res. 657, 667 (2002), find that children with pervasive developmental disorders, as with most children, are more playful in the presence of a dog. Perhaps the school saw this as contrary to the educational environment.

Chur-Hansen et al. *The Experience of Being a Guide Dog Puppy Raiser Volunteer: A Longitudinal Qualitative Case Study*, 5 Animals 1 (2014), notes that even well-trained guide dogs do "not always manage to hold their attention to their tasks," and can become distracted.[10]

B. The school's separation of Wonder and E.F. during much of the trial period, and the refusal to allow Wonder into the school after that period had Petitioners continued to send E.F. to the school, controverted the very purpose of an assistance dog and threatened the daily development and enhancement of a bond between the child and the service dog.

The Sixth Circuit decision recognizes that there was a difference between having Wonder work with E.F. and having an aide work with her:

> If the human aide was not a sufficient accommodation, it was because he or she did not help E.F. learn to function independently as effectively as Wonder would have and perhaps because he or she was not as conducive to E.F.'s participating confidently in school activities as Wonder would have been. The complaint does not allege that the human aide

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[10] Play time is very important to service dogs, which are often selected from breeds known for playfulness. See Sabrina Hauser et al. *Understanding Guide Dog Team Interactions: Design Opportunities to Support Work and Play*, Proceedings of the 2014 Conference on Designing Interactive Systems 1 (2014).

> was less effective than Wonder would have been in providing immediate physical assistance. . . .

Fry, 788 F.3d at 627. This is of course the point of having a service animal. Although an aide can pick up a dropped pencil or help a child move from a wheelchair to a toilet,[11] perhaps with less effort for the child than must be made with a dog, the child feels more independent with the dog than with the aide. The majority then argues:

> Developing a bond with Wonder that allows E.F. to function more independently outside the classroom is an educational goal . . . [which] falls squarely under the IDEA's purpose of "ensur[ing] that children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). Thus developing a working relationship with a service dog should have been one of the "educational needs that result from the child's disability" used to set goals in E.F.'s IEP.

Fry, 788 F.3d at 628. The logic appears to be that the school, having for nearly a year refused to accept the

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[11] Stacey K. Fairman and Ruth A. Huebner, *Service Dogs: A Compensatory Resource to Improve Function*, 13(2) Occupational Therapy in Health Care 41 (2000), found that 17.8% of users receiving service dogs from a broad-based training organization received assistance from their dogs in "toileting."

dog as a service dog or to acknowledge his benefits, should be allowed additional time through IDEA procedures to come to its senses and realize that the dog would be better than just a human aide at making E.F. as independent as possible, despite the fact that allowing the school such an additional grace period might damage the bond that needed to be formed between the girl and the dog. In a suit against a Florida school board, a Florida federal district court found:

> Separation of a service animal from the target member of its team is detrimental in diminishing the animal's responsiveness and effectiveness, reducing the animal's ability to respond and perform tasks for its target, and disrupting the animal-target bond that is important to the effective working connection between members of the service dog team. . . . These negative effects carry over even when the service dog team is reconnected.

Alboniga v. School Board of Broward County Florida, 87 F.Supp.3d 1319, 1324 (S.D. Fla. 2015). Mary R. Jalongo, *Attachment Perspective on the Child-Dog Bond: Interdisciplinary and International Research Findings*, 43(5) Early Childhood Ed. J. 395, 398 (2015), argues that "[m]ore activities shared together lead to a stronger bond. . . ." *Id.* at 399. Jalongo states that "[r]elationships are established as each partner gains more information about the characteristic reactions of the other and forms reciprocal expectations for subsequent behavior. . . ." Outcomes, such as "retrieving objects for children with limited mobility . . . rely on

reciprocal attachment between child and dog." *Id.* at 400.

The relationship with the individual with a disability is likely to be the third important one in a service dog's life, which begins with a puppy raiser until the dog is at least six months old, followed by an extended relationship with a trainer or training group until the dog is over a year and perhaps two years old.[12] Probably because of the prevalence of guide dogs in many countries, most research projects on human-dog bonds involving service dogs have studied guide dogs and their users. Speaking of the relationship between guide dogs and blind masters, Sz. Naderi et al., *Co-operative Interactions between Blind Persons and Their Dogs*, 74 Applied Animal Behaviour Science 59, 78 (2001), found that "as the blind person and the guide dog is becoming accustomed to each other, many minute changes take place in their co-operative behaviour." This research team notes that as guide dog and master get to know one another, they "can invent new types of joint actions, or they can modify learned ones or omit learned behaviours that do not seem to have any advantages for them." *Id.* at 79.

The bonding process is as essential to the service dog as it is to the master, and given that the average

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[12] See Gaia Fallani et al., *Do Disrupted Early Attachments Affect the Relationship between Guide Dogs and Blind Owners?* 100 Applied Animal Behaviour Science 241, 253 (2006). The length of the training period of a service animal varies considerably by function and school. E.F.'s dog had received ten to twelve months of training. OCR Report at JA 21.

dog's life is only a fraction of the average human's life,[13] the dog's adaptation should begin as soon as possible after its training is completed.[14] Natalie Sachs-Ericsson et al., *Benefits of Assistance Dogs: A Review*, 47(3) Rehabilitation Psychology 251, 254 (2002), note that there are "four elements of the human-animal bond: *safety*, *intimacy*, *kinship*, and *constancy*." Respondents were willing to interfere with constancy in the relationship of E.F. and Wonder and appeared disapproving of the intimacy. Jozsef Topal et al., *Reproducing Human Actions and Action Sequences: "Do as I do!" in a Dog*, 9 Animal Cognition 355 (2006), studying the learning patterns of a mobility impairment dog named Philip, concluded that even though dogs have a "very different body schema to that of humans," they can nevertheless "choose the correctly matching action" to imitate a human from their "own repertoire." *Id.* at 356. This is a complicated process:

> Transferring items from one place to another may be part of the species-specific repertoire of dogs; certainly, there was no doubt that

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[13] Service dogs are frequently retired between eight and ten years of age, though dogs begin to decline in "executive function" when about eight years old. Emily Bray et al., *Context Specificity of Inhibitory Control in Dogs*, 17 Animal Cognition 15, 27 (2014).

[14] It should perhaps be noted that some service dog training programs suggest that, even before dogs are paired with end-users with disabilities, they should be taken into training facilities and schools to aid in transitions to new environments as well as to new people. See Paolo Valsecchi et al., *Development of the Attachment Bond in Guide Dogs*, 123 Applied Animal Behaviour Science, 43, 48-9 (2010) (also noting, at 50, that "repeated bond breaking" can compromise full-fledged attachments).

> Philip possessed this action routine in his repertoire before our experiment. However, carrying cannot be regarded as a simple movement pattern, but a structured framework with 'cases' or 'slots' for agent, object, and to-and from-locations. Thus, when a dog observes a human demonstrator carrying an object, it may be said to 'understand' what the other is doing if its representation includes the specific contents of each slot.

Id. at 365. In developing such a "human-relevant repertoire," Topal et al. suggest that "experience plays a substantial role either in enhancing imitative performance or in generating imitative ability." *Id.*

III. THE POLICY OF RESPONDENTS ESTABLISHING SEPARATE AND ADDITIONAL PROCEDURAL REQUIREMENTS FOR USERS OF NON-GUIDE SERVICE ANIMALS THAN THOSE PROVIDED FOR USERS OF GUIDE DOGS VIOLATES THE AMERICANS WITH DISABILITIES ACT AND THE REHABILITATION ACT.

As stated in Judge Daughtrey's dissent, "[t]he school district refused to recognize Wonder as a service dog despite his official certification, possibly because school policy explicitly allowed 'guide dogs' – but not 'service dogs' – on school premises. . . ." *Fry*, 788 F.3d at 632-33. The report of the Office for Civil Rights states:

> During its investigation, OCR reviewed the District's policy with respect to service animals (the Policy) that was provided by the District. This policy is titled "Guidelines – Office of the Superintendent, Napoleon Community Schools," with the heading "Access to Equal Educational Opportunity." The guidelines are four pages long, and only one provision, under "Facilities," discusses "guide dogs." The Policy requires students seeking to utilize a guide dog to assist the student at school facilities, events, and programs to provide evidence of the dog's certification for that purpose.

OCR Report at JA 29. This Report states that the school and the school district held "multiple meetings [but] did not acknowledge the dog was a service animal. . . ." OCR Report at JA 34. Even after the OCR Report was issued, Respondents continued to maintain that Wonder was not a service dog, as noted in Judge Daughtrey's dissent. *Fry*, 788 F.3d 637.

The school's policy, which would have automatically admitted a guide dog, had E.F.'s disability been blindness, has already been noted. As Judge Daughtrey says:

> The stupefying fact . . . is that the school district's policy would explicitly have permitted [E.F.] to have a guide dog at school if she were blind, but was not interpreted to allow the use of a service dog as a reasonable accommodation for her mobility handicap – even in the face of federal regulations establishing that any distinction between a guide dog and a service dog is purely semantic.

Fry, 788 F.3d at 637. The reason for the school having a policy specific to guide dogs, among all service dogs, is not elucidated in the record,[15] though Judge Daughtrey notes that this policy allows the school to ignore Wonder's certification, which she finds "giv[es] lie to the claim that Wonder was objectionable because he might cause allergic reactions in staff members and students or become a distraction to others." *Fry*, 788 F.3d at 632-33.

Such a rigid distinction between guide and other service dogs ignores developments in the American law of service animals, which increasingly defines the term not by subcategorizing types of service animals but rather by requiring a functional connection between a trained animal and the disability of its owner or handler. Indeed, service dogs are now often being trained to deal with combinations of disabilities, both physical and mental, that might be specific to just one individual. Thus, a mobility impairment dog might also detect and respond to seizures. A diabetic alert and response dog might help pull a wheelchair. One researcher

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[15] Mentioning only guide dogs, or only guide and signal dogs, is sometimes a legacy of the American history of the law of service animals, under which guide dogs were for decades the only animals serving such medical functions. See John J. Ensminger, *Service and Therapy Dogs in American Society* 47-48 (2010). Guide and signal dogs were the only specific types of service animals listed in the first definition of "service animal" in the Title III regulations issued in 1991. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,544, 35,555, 35,594 (1991).

funded by the Department of Education's Office of Special Education and Rehabilitative Services states:

> Service animals provide support for people with disabilities at a level we could not have foreseen just decades ago. They have expanded our understanding of the variety of tasks that can be done, different types of people with disabilities who can be served, and the effect of the animal on the lives of people with disabilities.

Margaret K. Glenn, *An Exploratory Study of the Elements of Successful Service Dog Partnerships in the Workplace*, 2013 ISRN Rehabilitation 278025: 1 (2013). The 2010 revisions to the Title II and Title III regulations under the ADA both begin the definition of "service animal" by saying that this is "any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability. . . ." 28 C.F.R. § 35.104 (2015); 28 C.F.R. § 36.104 (2015). What follows in the definitions are a series of examples, including for present purposes, "guiding individuals who are blind or have low vision, . . . pulling a wheelchair, fetching items, . . . retrieving medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, . . . [and] with navigation." *Id.* Such an approach accurately suggests that dogs can have slightly different functions for individuals with similar but not identical disabilities. The school district's guide-dog-only policy in the present case demonstrates a lack of understanding of the types of service animals that might

be trained and developed for children with a wide range of physical and mental impairments.

It is no surprise that the mobility functions of E.F.'s service dog have overlaps with the mobility functions of guide dogs.[16] The mobility functions performed by Wonder, the non-guide service dog in this case, are similar to the mobility functions performed by a guide dog, though the disabilities of the persons served differ, and those functions have no educational components properly limited or altered by teachers, aides, or a school system, or properly considered under IDEA procedures, other than recognition of the dog's presence with a child in school and its functions. Exhaustion should not be required for a non-guide service dog when it would automatically not be necessary for a guide dog. An affirmance in this case would send a message to schools and other institutions that have policies or rules giving preferences to, or only acknowledging the existence of specific types of dogs, such as guide dogs and signal dogs, that such restrictions could be maintained as a mechanism to delay the acceptance

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[16] See L. Whitmarsh, *The Benefits of Guide Dog Ownership*, 7(1) Visual Impairment Research 27, 37 (2007), noting that a "guide dog is trained at considerable expense to provide mobility assistance. " Many guide dog users have some level of "residual vision" and this and the functional abilities, requirements, and preferences of the specific owner must be taken into account in training the dog and adapting it to the owner. *Id.* at 38-9. See also Max von Stephanitz, *The German Shepherd Dog in Word and Picture* 399-400 (English ed. 1923) (discussing how guide dogs were developed by trainers of ambulance dogs, which had aid functions for both blinded and otherwise wounded and thus mobility-impaired soldiers on battlefields in World War I).

of service dogs with other functions onto school grounds or into classrooms.

CONCLUSION

Users of service animals encounter prejudices against animals, something that users of wheelchairs and walkers do not have to deal with. Schools have had to adapt to the increasingly varied and complex types of service animals, but the education of teachers and other staff members about the functions of such dogs and their importance in the lives of children should not become part of, or be allowed to interfere with, a child's use of a trained service dog and such a dog's performance of its functions for a child. That will happen if the child is merely allowed to be with the dog. An Individualized Education Program is not a learning curve for educators to become familiar with a child's use of a service animal, but rather is a plan for the child to obtain the knowledge and skills that can be given by teachers in classrooms.

The Frys had no issue with the educational programs of the Ezra Eby Elementary School. Rather, they merely wanted to follow through on the prescription of a pediatrician to obtain a service dog for E.F. so that she could use the dog everywhere it could help her, including at school. They obtained the outside assistance of therapists to help E.F. learn to work with Wonder. They asked nothing from the school in this regard, and quickly realized that the school, or at least the

school administrators, did not know and refused to understand that Wonder was a type of highly trained service animal. Indeed, the school system only accepted guide dogs for the blind as legitimate service animals. In frustration the Frys turned to the Office for Civil Rights. After a thorough analysis, this agency admonished the school system for its failure to recognize E.F.'s need for Wonder, yet the school system continued to reject OCR's findings while agreeing to take appropriate action. A school system that reacts in such a knee-jerk, uninformed manner, for over two and a half years, should not be allowed to throw up sequential and useless procedural barriers to prevent or delay a service animal from accompanying a child into a classroom.

The decision of the Sixth Circuit should be reversed.

Dated: August 26, 2016

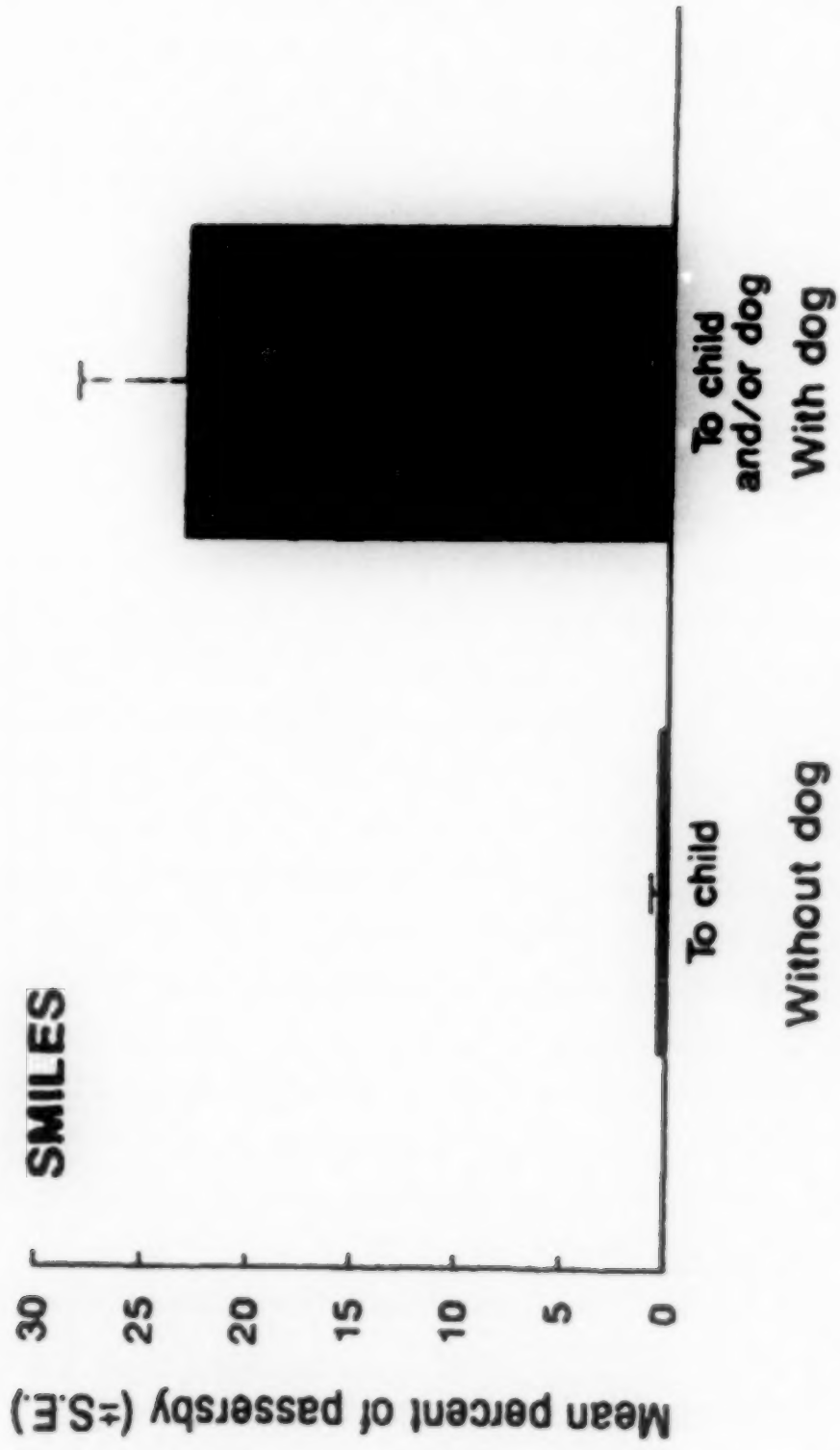
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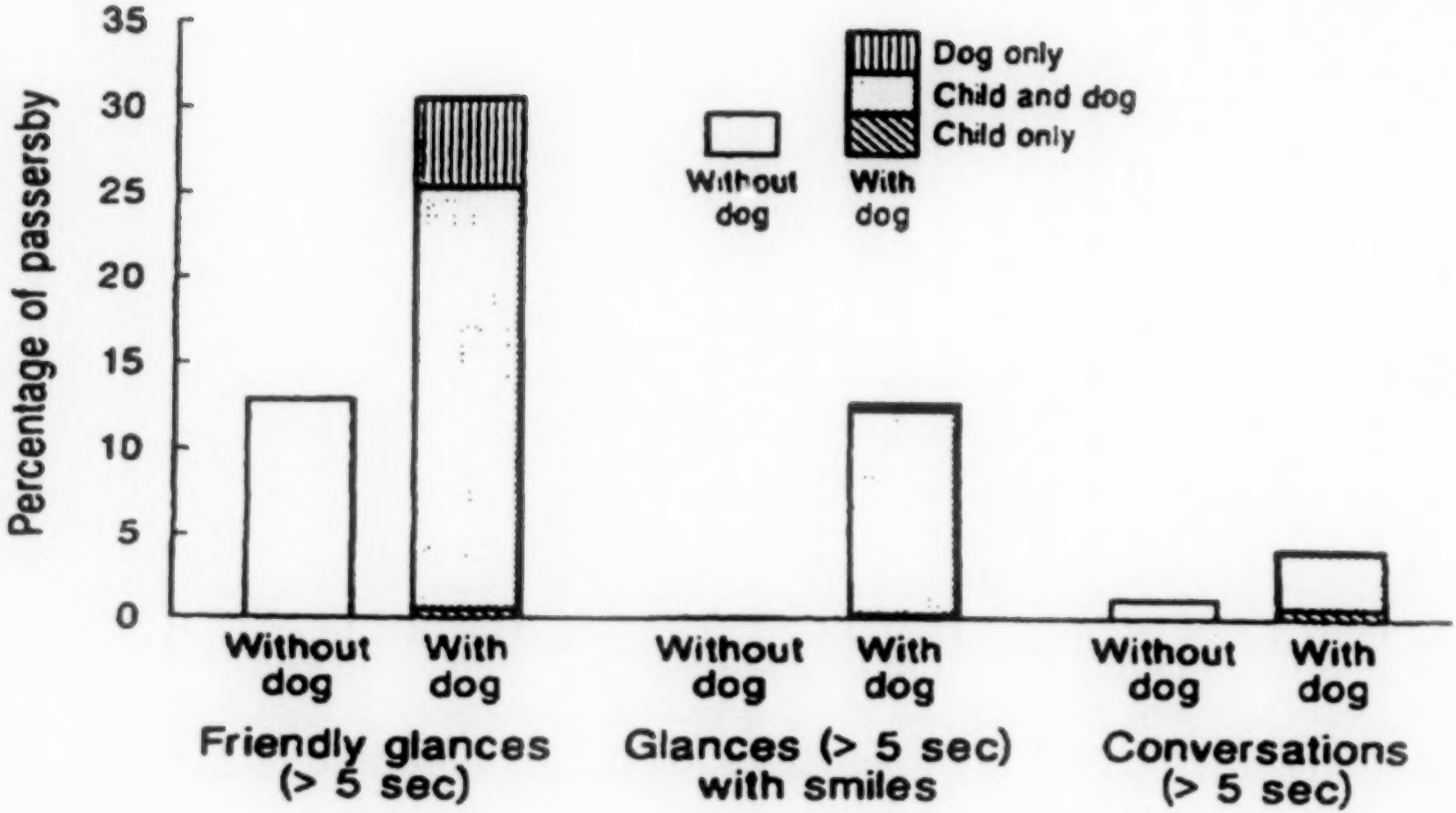
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APPENDIX A: Statistical Evidence of Normalizing Effect of Service Dogs

Bonnie Mader, et al., *Social Acknowledgments for Children with Disabilities: Effects of Service Dogs*, 60(6) Child Development 1529 (1989), examined whether disabled children in wheelchairs with service dogs receive more frequent social acknowledgment than when no dog is present. They recorded behaviors of people who passed children in wheelchairs in shopping malls and on school playgrounds and found that social acknowledgements of the children by friendly glances, smiles, and conversations were substantially more frequent when a service dog was present. The following two figures from their paper (reproduced with permission) demonstrate the dramatic difference in what happens when a child has a service dog, and when he or she does not:


SMILES
Mean percent of passersby (±S.E.)
30
25
20
15
10
5
0
To child
Without dog
To child and/or dog
With dog


Percentage of passersby
35
30
25
20
15
10
5
0
Dog only
Child and dog
Child only
Without dog
With dog
Without dog
With dog
Without dog
With dog
Without dog
With dog
Friendly glances (> 5 sec)
Glances (> 5 sec) with smiles
Conversations (> 5 sec)

App. 3

Id. at 1533. The first figure shows the mean percent of public passers-by offering smiles to children using wheelchairs and/or their service dogs, shown as a function of whether a service dog was present. The second figure shows the mean percent of public passers-by offering friendly glances or conversations to children using wheelchairs as a function of whether a service dog was present. Friendly glances are divided into those above and below five seconds. Children with dogs received much friendlier contacts with passers-by than children without dogs. The authors concluded that "[s]ervice dogs may assist in normalizing the social interactions for children with disabilities producing social isolation." *Id.* at 1529.